

BRB No. 97-1586

BRIAN CODD

Claimant

v.

STEVEDORING SERVICES
OF AMERICA

and

HOMEPORT INSURANCE COMPANY

Employer/Carrier-
Petitioners

SOUTH STEVEDORING

and

SIGNAL MUTUAL INDEMNITY
ASSOCIATION

Employer/Carrier-
Respondents

DATE ISSUED:

DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of Joyce L. Terry, District Director, United States Department of Labor.

William N. Brooks, II (Law Offices of James P. Allecia), Long Beach, California, for Stevedoring Services of America and Homeport Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Stevedoring Services of America (SSA) appeals the Compensation Order Award of Attorney Fees (Case Nos. 18-58254, 18-57254) of District Director Joyce L. Terry rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. See, e.g., *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, on May 2, 1994, suffered a work-related back injury during the course of his employment with SSA. On September 12, 1994, claimant suffered an injury to his left knee and lower back while working for South Stevedoring (South). Subsequent to these injuries, claimant filed two separate claims seeking benefits under the Act against SSA and South respectively, and those claims were consolidated for purposes of disposition.¹

¹The complete procedural history of the instant case is discussed at length in the Board's decision in *Codd v. Stevedoring Services of America*, BRBS , BRB Nos. 97-0608/A (Jan. 23, 1998).

Administrative Law Judge Samuel J. Smith (the administrative law judge) determined that claimant is entitled to concurrent disability awards. With respect to the May 2, 1994, work-related injury, the administrative law judge awarded claimant temporary total disability compensation from May 3, 1994 through August 1, 1994, 33 U.S.C. §908(b), temporary partial disability compensation from August 2, 1994 through August 15, 1994, 33 U.S.C. §908(e), and permanent partial disability compensation from August 16, 1994 through September 12, 1994, and from February 28, 1996 and continuing, payable by SSA. 33 U.S.C. §908(c)(21), (h). With respect to the September 12, 1994, work-related injury, the administrative law judge determined that South is liable for claimant's award of temporary total disability compensation from September 13, 1994 through February 27, 1996, 33 U.S.C. §908(b), and for permanent partial disability benefits from February 28, 1996 and continuing. See 33 U.S.C. §908(c)(21), (h). In addition, the administrative law judge awarded both SSA and South relief under Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge's award of benefits was affirmed on appeal.² *Codd v. Stevedoring Services of America*, BRBS , BRB Nos. 97-0608/A (Jan. 23, 1998).

Subsequent to the award of benefits, claimant's counsel sought an attorney's fee of \$4,480, representing 25.6 hours at \$175 per hour, for work performed before the district director in connection with the claims against SSA and South. SSA filed with the district director its objections to the fee petition, contending that its liability for any fee should be limited to the services performed by counsel prior to the date of claimant's work-related injury at South, September 12, 1994. South did not respond to the fee petition submitted to the district director. In her Compensation Order Award of Attorney Fees, the district director, after consideration of employer's objections, found that the requested hourly rate of \$175 and the total number of hours requested by counsel were reasonable, and thus awarded an attorney's fee in the sum of \$4,480. As for the issue of liability, the district director found that claimant's counsel assigned charges to the respective employer when he itemized his services. She thus apportioned liability in accordance with claimant's fee petition. For those services which involved issues and disputes regarding both employers, the district director concluded that those fees should be borne equally by SSA and South. Consequently, SSA was found liable for \$2,196.25 in attorney's

²In its decision, the Board affirmed the administrative law judge's Decision and Order Denying Director's Motion to Vacate Decision and for Disqualification, and his Decision on Petition for Reconsideration, but vacated the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Costs, and remanded the case for further consideration of the attorney's fee requested. *Codd*, slip op. at 10-12.

fees and South responsible for \$2,283.75 in attorney's fees.

On appeal, SSA challenges the district director's apportionment of certain fees equally between the two employers. South has not responded to this appeal.

SSA argues that the district director mistakenly apportioned the awarded fee for a total of 1.5 hours of attorney work equally between the two employers in the instant case, when in fact, that work was performed solely with regard to claimant's subsequent injury while employed with South. Specifically, SSA asserts that counsel's contact with Drs. Glenn (.4 hours) and Nelson (.9 hours) pertain to the medical care and treatment immediately following the September 12, 1994, injury, during claimant's employment with South, and consequently, argues that South should be held solely liable for these fees.³ In support of its contention, SSA forwards a letter dated April 22, 1997, composed by claimant's counsel, Richard Mark Baker, to the administrative law judge in regard to his fee petition before the administrative law judge, in which counsel states that "with respect to costs, particularly costs incurred securing the testimony of Dr. Russell Nelson, the claimant concurs that Dr. Nelson's testimony was necessary so as to establish the nature and extent of Mr. Codd's disability attributable to his September 12, 1994, injuries and should, therefore, be allocated to South Stevedoring." SSA's Brief in Support of Petition for Review, Exhibit 4.

In her Compensation Order, the district director acknowledged and rejected SSA's objection that it should only be responsible for attorney's fees for the time frame of July 20, 1994, through September 11, 1994, and she relied exclusively upon counsel's assignment of liability regarding his itemized services. In his fee petition, counsel noted that each of the services now questioned by SSA involved issues concerning both injuries and, thus, asserted that the fees associated with these services should be assessed equally between the two employers. In light of this representation, the district director found SSA and South equally liable for these fees. Inasmuch, however, as the district director, in her disposition as to the liability for attorney's fees, relied upon claimant's counsel for guidance and SSA has submitted documentation from counsel to the extent that the services required in obtaining Dr. Nelson's medical report are entirely related to claimant's second injury, we vacate the

³The entries to which SSA objects are as follows: .2 hours on September 15, 1994, reflecting a telephone conference with Dr. Glenn's office; .5 hours on September 19, 1994, regarding review of Dr. Nelson's initial examination report; .2 hours on September 19, 1994, representing a telephone conference with Dr. Glenn's office; .2 hours on September 26, 1994, pertaining to a letter directed to carrier; and .4 hours on October 17, 1994, noting review of Dr. Nelson's narrative medical report. As an initial matter, we reject employer's contention regarding the .2 hours dated September 26, 1994, as the district director has already adjudged South liable for this service.

district director's finding that SSA and South are equally responsible for these services, and hold that South is solely liable for the .9 hours expended by claimant's counsel in pursuing this evidence. Consequently, employer's liability for attorney's fees is reduced by \$78.75 to \$2,117.50, while South's liability is increased by that amount to \$2,362.50. We however reject SSA's contention that it is not liable for the .5 hours of services rendered by counsel in regard to Dr. Glenn as it has not adequately shown that the district director's decision on this matter is flawed.⁴ See *generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the district director's determination that SSA and South are equally liable for counsel's services related to the procurement of Dr. Nelson's medical report is vacated and we hold that liability for said services falls solely upon South. The district

⁴Claimant's counsel's letter is silent as to services rendered with regard to Dr. Glenn.

director's Compensation Order Awarding Attorney Fees is therefore modified to reflect that employer is liable for an attorney's fee in the amount of \$2,117.50, while South is liable for an attorney's fee in the amount of \$2,362.50. In all other regards, the district director's Compensation Order Award of Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge